TITIRIA SDN. BHD.

v.

ZURICH INSURANCE (MALAYSIA) SDN. BHD.

HIGH COURT SABAH & SARAWAK, KOTA KINABALU
TUAN IAN H.C. CHIN J
[SUIT NO. K 159 OF 1992]
23 SEPTEMBER 1995

INSURANCE: *Fire insurance policy - Renewal of policy - Policy providing for grace period of 60 days to pay premium - Plaintiff issuing post-dated cheque to cover premium - Cheque not banked in by defendant - Whether there was a policy in force on the date of the fire - Whether defendant entitled to repudiate liability - Whether there was a breach of warranty 9(A) of the policy - Whether the words "Local Municipal Council or other Authorities" include statutory boards and government departments - Application of the ejusdem generis rule - Whether there was non-disclosure of material facts - Failure to answer question in proposal form - Whether amounts to a false representation in a material particular or a failure to disclose material facts - Whether failure to answer can be equated to a negative answer - Whether renewal of policy void.*

The plaintiff carried on, *inter alia,* the trade of tyre retreading. The plaintiff first took out a fire insurance policy with the defendant in 1991 but this policy expired uneventfully on 10 February 1992. The plaintiff renewed the policy and issued a cheque post-dated to 9 April 1992 in payment of the premium. This cheque was never presented by the defendant for payment and a fire occurred on 14 April 1992 which destroyed the goods and machinery referred to in the policy. The plaintiff sought to recover the damages incurred under the policy.

The defendant sought to repudiate liability by arguing that the policy was no longer in force because the premium was not paid and a receipt was not issued which, contended the defendant, are conditions set by the terms of the policy for the policy to be in force. Counsel for the defendant argued that the handing over of the post-dated cheque cannot constitute payment and "payment" must be construed to mean actual payment in cash or by current dated cheque or by postal order. Counsel supported his argument by reference to the Insurance (Assumption of Risks and Collection of Premiums) Regulations 1980.

The defendant further contended that they are entitled to repudiate liability on the grounds that the plaintiff was in breach of warranty 9(A) of the policy which, *inter alia,* provides that the plaintiff shall hold all licences as are required by the Local Municipal or other Authorities. In this regard the question that arose was whether warranty 9(A) was a condition precedent and whether the words "Local Municipal" could be construed to include statutory boards and government departments established under legislation other than the Local Government Ordinance 1961.

The defendant also contended that there was non-disclosure of material facts by the plaintiff and that the failure to answer question 9 in the proposal form amounted to a false representation in a material particular or a failure to disclose material facts because the plaintiff had failed to disclose the fact that there was solution containing petrol or other volatile liquid in the premises.

Held:

[1] The construction of the policy involves the ascertainment of the word or words used by the parties and the determination of the legal effect of those words. The objective is to ascertain what the mutual intentions of the parties were as to the legal obligations each assumed by the contractual words in which they sought to express them. This intention must be ascertained from the language they have used and considered in the light of the surrounding circumstances and the object of the policy. In the circumstances resort cannot be had to the Insurance (Assumption of Risks and Collection of Premiums) Regulations 1980 because the said regulations do not supply the definition for "payment" as used in the fire policy.

[2] In the present case the provisions relating to payment of premium must be construed in the light of the statutory provisions governing the same, namely s. 14A(l)(a) and (2) of the Insurance Act 1963 (the Act) and the premium warranty clause in the policy which provides that the insured shall be granted 60 days grace to pay the premium. Neither the Act nor any provision in the policy stipulates that cash or current dated cheques must be tendered in payment. Even if the word "payment" can be stretched to mean cash payment or payment by current-dated cheque, a post-dated cheque becomes current-dated on the due date and such a cheque is to be treated as cash. In the circumstances the premium is to be regarded as having been paid on 9 April 1992 when the plaintiff's cheque became current, unless it was dishonoured after presentation for payment, and it is from that date that the policy is to be regarded as having come into force.

[3] On the submission that the plaintiff was financially unsound and was therefore unable to meet the cheque, evidence was adduced which *prima facie* established that the plaintiff had sufficient cash to meet the cheque on the day concerned or had an overdraft facility which exceeded the value of the cheque. In the light of the *prima facie* evidence that the plaintiff would be able to meet the cheque, the burden shifted to the defendant to establish that the plaintiff did not have sufficient cash or an overdraft facility to meet the payment of the cheque, which the defendant failed to do. Therefore, in the absence of any evidence to the contrary, the Court has to conclude that the cheque, if presented, would have been met.

[4] On the question of whether the defendant was requested not to present the cheque for payment, the evidence is evenly balanced and there is no preponderance of probability. On the one hand there is the evidence that the plaintiff wanted insurance for the goods, is financially able to meet the cheque and that the plaintiff's managing director had not instructed anyone to request the defendant not to present the cheque for payment. On the other hand there is the evidence of the defendant's witnesses that one Mr. Lim had called them to tell them not to present the cheque for payment. It had not been proven that Mr. Lim was a person clothed with authority to represent the plaintiff and as it was the defendant's assertion that Mr. Lim requested that the cheque not be presented for payment, the burden of proving that assertion was on the defendant. Since the evidence was evenly balanced, the defendant had failed to discharge that burden of proof.

[5] The commencing part of the policy expressly states that whatever condition is endorsed on the policy shall be deemed to be a condition precedent. The very provision under consideration, namely warranty 9(A) of the policy was considered in *New Zealand*

Insurance Co. Ltd. v. Ong Choon Lin and the Supreme Court there came to the conclusion that it is a condition precedent and it must also be so in this case.

[6] It was admitted by the parties in the present case that the words "Local Municipal" in warranty 9(A) included the Kota Kinabalu Municipal Council (the Council) which was established under s. 3 of the Local Government Ordinance 1961. Clearly the words "Local Municipal" described something which could be placed under the common category of local government authorities and they, as such, constitute a *genus* which therefore attracts the *ejusdem generis* rule. Therefore the general words "Other Authorities" in warranty 9(A) must be construed *ejusdem generis* and be limited to local government authorities established under the said Ordinance. In the circumstances the only local government authority that falls to be considered is the Council and the words "Other Authorities" could not be construed to include statutory boards and government departments established under legislation other than the Ordinance.

[7] On the question of whether there was breach of warranty 9(A) of the policy, the defendant's argument that the plaintiff was using the premises as a manufacturing factory and not as a warehouse and that this was without the approval of the Council and did not comply with the occupation certificate, was without merit. In considering what use the premises may be put to, it is not the word "warehouse" stated in the occupation certificate that the Court must take into account but rather, the words "light industrial warehouse". Since the word "industrial" comes from the word "industry" which latter word means "a branch of trade or manufacture", the use of the premises for manufacturing tyres was an approved use of the premises and the plaintiff was not in breach of warranty 9(A) of the policy.

[8] Since it was clear from the evidence adduced that it was the then Sabah branch manager of the defendant who had filled in the proposal form for the managing director of the plaintiff, who does not read or write English, and since the proposal form was filled in after a question and answer session and as there was no reason to disbelieve the evidence of the managing director of the plaintiff that he had answered all the questions posed to him, there was no non-disclosure of material facts entitling the defendant to repudiate the policy.

[9] The defendant's witness, Ivy, testified that before the issue of the policy she visited the premises and saw tyres being retreaded. The retreading of tyres involved the use of gum, a volatile substance, and Ivy was therefore aware of the use of gum. This knowledge, by virtue of s. 44A of the Insurance Act 1963, became the knowledge of the defendant and it therefore cannot be said that the plaintiff, by failing to answer question 9 of the proposal, had failed to disclose the same as to affect the defendant's decision whether to insure the risk or not. What is clear from the evidence is that the defendant, despite the absence of an answer to question 9, still proceeded to issue the policy because Ivy was aware of the volatile substance and was prepared to accept the risk. In any event, though the answer to question 9 of the proposal form was not written down, the answer can be considered as having been provided by the plaintiff showing Ivy the premises where the volatile substance was used.

[Plaintiff's claim allowed with costs. Damages assessed at RM543,257, as agreed between the parties].

Cases referred to:

Morello Sdn. Bhd. v. Jaques (International) Sdn. Bhd. [1995] 1 AMR 873 FC 891 ***(refd)***
Chooi Siew Cheong v. Lucky Height Development Sdn. Bhd. & Anor. [1995] 1 AMR 929 FC ***(refd)***
Loh Wai Liang v. SEA Housing Corp. Sdn. Bhd. [1987] 2 MLJ 1 PC ***(refd)***
Fielding and Platt v. Najjar [1969] 2 All ER 150, 152 ***(refd)***
Government of the State of Penang & Anor. v B.H. Oon & Ors. [1971] 2 MLJ 235 PC ***(refd)***
New Zealand Insurance Co. Ltd. v. Ong Choon Lin [1992] 1 MLJ 185 SC ***(foll)***
Stoneham v. Ocean Railway and General Accident Insurance Co. [1887] 19 QBD 237 ***(dist)***
China Insurance Co. Ltd. v. Ngah Ah Kau [1972] 1 MLJ 52 ***(dist)***

Legislation referred to:

Building By-Laws 1951, By law 2(1), 3, 38D, 46A
Electricity Act 1990
Factories and Machinery Act 1967
Insurance Act, 1963, s. 14A(1)(a), (2), 44A
Insurance (Assumption of Risks and Collection of Premiums) Regulations, 1980
Lembaga Letrik Sabah Act 1983
Local Government Ordinance, 1961, s. 3
Town and Country Planning Ordinance s. 15
Trade Licensing Ordinance 1948

Other source referred to:

Interpretation of Contracts, Lewison p. 142
New Oxford Illustrated Dictionary, p. 266

For the plaintiff - Tan Mon Kian (Victoria Lai with him); M/s. Dr. Yee, Tan & Norbert Chin
For the defendant - Clement Skinner; M/s. Skinner Lind Willie Wong & Chin

JUDGMENT

Ian H. C. Chin J:

Introduction

This is a claim by Titiria Sdn. Bhd ("the plaintiff") for a sum of RM800,000 under a fire insurance issued by Zurich Insurance (Malaysia) Sdn. Bhd. ("the defendant"). In the course of the hearing, it was conceded by Mr. Tan Mon Kian, learned Counsel for the plaintiff that in the event of judgment for the plaintiff the amount recoverable as damages is only RM543,257. I will next proceed to set out the facts of this case and will, where they are disputed, make my findings as well I will also in the same process advert to the law.

Facts of Case & Contentions

The plaintiff carried on, *inter alia*, the trade of tyre retreading. They first insured with the defendant in 1991 for RM500,000 but this policy expired uneventfully on 10 February 1992. For this policy, Tee Wee Jeng ("Tee"), the plaintiff's managing director, signed the proposal form dated 9 February 1991 which contained answers which Ng Tiam Choi ("Ng"), the then Sabah branch manager of the defendant, had written after obtaining the details for the answers from Tee, who cannot read or write English. Question 9 of the proposal form was left unanswered and this question reads:

> 9. Is or will there he any process involving the use of petrol or any solution containing petrol or other volatile liquid carried on in the premises or within 50 feet thereof? If so, please give details.

Ng, when asked why there was no answer, merely said Tee did not give any answer. When cross-examined, he said the matter ought to have been followed up and he could not explain why this was not done. He admitted to knowing the type of business the plaintiff carried on

before the policy was issued. Tan Wai Hing @ Ivy ("Ivy") who was the then office manager of and who does the underwriting for the defendant, also testified for the defendant. She was in charge of the underwriting aspect of the insurance and she was responsible for determining the premium payable in respect of the risk insured. She testified that the omission to answer Question 9 was regarded by her as an answer in the negative. But, she said that a new proposal form had to be filled in for a renewal of the policy if the amount of insurance was increased and there is no written indication from the insured to state any changes which the policy required the insured to inform the defendant. In the present case, she said there was in fact another proposal form filled in for the purpose of the policy. When re-examined, she said she was not sure whether there was one. Before the policy was issued, she went to inspect the premises of the plaintiff and there saw workers curing tyres and working on machines. This was after Ng had discussed with Tee the increased cover.

According to Ng, a renewal notice dated 2 January 1992, was delivered by him to Tee. The renewal notice referred to the old insured sum of RM500,000 but the plaintiff wanted an increase in the sum to be insured for additional machinery and stock and they entered into discussion. The insured sum, stated in the renewal notice, was eventually raised to RM800,000. Tee elaborated these events in his evidence in this way, *viz.*:

> (Witness shown P18) This is the renewal form. It was handed to me. Christopher Ng inspected premises before he handed over renewal form. After inspection with Ng. I signed P18. Before I signed P18 Ng asked me whether I had renewed any trading licence I told him we had and give him a copy. Ng asked me whether I have added anything I said yes. That is why I increased the coverage. Disclosed to Ng other policy with QBE...He asked me to cancel insurance with Q.B.E I issued a cheque I told Ng had added new equipment with money lent by Sabah Finance and Sabah Finance suggested I took the policy from Q.B.E. He asked me to cancel and add to defendant's insurance. I did not pay premium for Q.B.E. but I let it lapsed. I called defendant and someone came to collect it. I do not know who it was. Someone signed the voucher, After defendant collected cheque, no one from defendant call me and I did not call them. Fire on 14 April 1992.

As a result another policy ("the policy") was then on 28 January 1992, issued by the defendant to the plaintiff and the policy together with a debit note for the premium was delivered to a servant of the defendant, called Mr. Lim. A cheque for RM3,602, post-dated to 9 April 1992, in payment of the premium was collected by Ivy on 20 February 1992. This cheque was not on 9 April 1992 or thereafter, presented by the defendant for payment and a fire occurred on 14 April 1992, which destroyed the goods and machinery referred to in the policy. The evidence will be adverted to in more detail when the contentions are considered. This brings me to the first of the issues, which is whether the policy was in force on the date of the fire.

A. Was the policy in force on 14 April 1992?

Mr. Clement Skinner, learned Counsel for the defendant, contends that the policy was no longer in force because the premium was not paid and a receipt was not issued by the defendant, which are conditions set by the terms of the policy for the policy to be in force. For his argument, the Court was referred to the commencing part of the policy and condition 2, the relevant parts of which read:

> In consideration of the insured...paying to the company....the premium mentioned in the schedule...
>
> The company agrees (subject to the conditions contained herein or endorsed hereon which conditions shall so far as the nature of them respectively will permit be deemed conditions

precedent to the right of the insured to recover hereunder) that if after payment of the premium the property... is destroyed or damaged by Fire....the company shall pay the insured the value of the property....

CONDITIONS

...

2. No payment in respect of any premium shall be deemed to be payment to the company unless a printed form of receipt for the same signed by an official or duly appointed agent of the company shall have been given to the insured.

Mr. Skinner then argued that the handing over of the post-dated cheque cannot constitute payment and "payment", the word used in the policy, must according to Mr. Skinner be construed to mean actual payment in cash or by current-dated cheque or by postal order. It is urged that the Court can look for support for such a construction to the Insurance (Assumption of Risks and Collection of Premiums) Regulations, 1980, which govern motor vehicle insurance. I am unable to agree that resort can be had to the said Regulations because the Regulations do not supply the definition for "payment" as used in a fire policy. What has to be done, as regards this issue, is the construction of the policy which involves the ascertainment of the word or words used by the parties and the determination of the legal effect of those words. The objective is to ascertain what the mutual intentions of the parties were as to the legal obligations each assumed by the contractual words in which they sought to express them. This intention must be ascertained from the language they have used and considered in the light of the surrounding circumstances and the object of the policy. See *Lewison on Interpretation of Contracts*, pp. 1-6; *Morello Sdn. Bhd. v. Jaques (International) Sdn. Bhd.* [1995] 1 AMR 873 FC 891: *Chooi Siew Cheong v. Lucky Height Development Sdn. Bhd. & Anor.* [1995] 1 AMR 929 FC 941. In the present case, the provisions relating to payment of premium must also be construed in the light of statutory provision governing the same (see *Loh Wai Liang v. SEA Housing Corp. Sdn. Bhd.* [1987] 2 MLJ 1 PC) which, in this case is s. 14A(1) (a) and (2) of the Insurance Act, 1963. which says:

(1) Subject to subsections (2) and (3) no insurer shall assume any risk in respect of any general insurance business unless and until...

(a) the premium payable is received by the insurer or is guaranteed to be paid by such person in such manner and within such time as may be prescribed.

(b) ...

(2) Where the premium payable pursuant to subsection (1) is received by any person including an insurance agent or broker on behalf of an insurer such receipt shall be deemed to be receipt by the insurer for the purposes of that subsection and the onus of proving that the premium payable was received by a person including an insurance agent or a broker who was not authorised to receive such premium shall lie on the insurer.

Another provision of the policy which is relevant for determining the intention of the parties with regards to the payment of the premium is the premium warranty clause which reads:

It is a fundamental and absolute special condition of this contract of insurance that the premium due must be paid and received by the insurer within sixty (60) days from the inception date of this Policy/Endorsement/Renewal Certificate.

If this condition is not complied with then this contract is automatically cancelled and the insurer shall be entitled to the pro rata premium for the period they have been on risk.

Where the premium payable pursuant to this warranty is received by an authorised agent of the insurer, the payment shall be deemed to be received by the insurer for the purposes of this warranty and the onus of proving that the premium payable was received by a person including an insurance agent who was not authorised to receive such premium shall lie on the insurer.

Subject otherwise to the terms and conditions of this policy.

Since the policy has to he construed in the light of the provision of s. 14A(1)(a) of the Insurance Act, 1963 it follows that the policy can only be considered effective if the premium has been received by the defendant. This calls into question the grace period of 60 days which the defendant allows the plaintiff to pay the premium under the premium warranty clause. It seems to contravene s. 14A(1)(a) which requires payment of the premium before the defendant is allowed to assume any risk. But neither the Act nor any provision in the policy stipulates that cash or current-dated cheques must be tendered in payment. Even if the word "payment" can he stretched to mean cash payment or payment by current-dated cheque, a post-dated cheque becomes current-dated on the due date and such a cheque is to be treated as cash (*Fielding and Platt v. Najjar* [1969] 2 All ER 150, 152 per Lord Denning MR). Because of the statutory provision it means that there was legally no assumption of risk by the defendant for the period before the cheque falls due on 9 April 1992. But the premium is to be regarded as having been paid on 9 April 1992, when the cheque becomes current unless it was dishonoured after presentation for payment. It is from that date that the policy is to be regarded as having come into force. The issue turns more on why the cheque was not presented for payment when it fell due on 9 April 1992.

In this respect, both Ng and Ivy had testified that an employee of the plaintiff called Mr. Lim had called them, respectively on 8 April and 9 April to request them not to present the cheque for payment. Mr. Lim was not called to give evidence. Tee testified that he had not instructed Mr. Lim to telephone the defendant not to present the cheque for payment. He also said he did not know whether Mr. Lim did but he said Mr. Lim cannot do that without his permission. Tee was cross-examined on why he had post-dated the cheque that was issued in payment of the premium. He explained not implausibly that since the plaintiff was allowed 60 days grace, he wanted to make use of the grace period. It was submitted that the plaintiff was financially unsound and was therefore unable to meet the cheque but he explained that the plaintiff had overdraft facility from the bank. Again, the assertion of Tee is supported by the bank statements which show the plaintiff's account was overdrawn for the month of March 1992, in the sum of RM2,689.17 and for the month of April 1992, in the sum of RM12,300.05. The plaintiff's ability to meet the cheque is also supported by the fact that on 9 April 1992 the plaintiff's account had a credit of RM13,529.53. The plaintiff had therefore adduced some evidence which *prima facie* established that the plaintiff had sufficient cash to meet the cheques on the day concerned or had overdraft facility which exceeded the value of the cheque. Therefore, in the absence of any evidence to the contrary, the Court has to conclude that the cheque if presented for payment would have been met. It is therefore not incumbent upon the plaintiff, contrary to the contention of Mr. Skinner to call the manager of the bank concerned to prove that the plaintiff had overdraft facility. When the evidence, *supra, prima facie* established the plaintiff to be able to meet the payment of the cheque, the burden shifted to the defendant to establish the plaintiff did not have sufficient cash or an overdraft facility to meet the payment of the cheque. It was then suggested that if the

plaintiff really had the funds to meet of the cheque the plaintiff would not have post-dated the cheque. The simple answer is that it is a provision of the policy, whether lawful or not, that the plaintiff be allowed to pay the premium with a 60-day grace and there is no reason why the plaintiff should not take advantage of it.

As for Mr. Lim, the person who was alleged to have called both Ng and Ivy not to present the cheque for payment, it had not been proven that he was a person clothed with authority to represent the plaintiff. Tee had testified to the effect that he had not authorized Mr. Lim to request either Ng or Ivy not to present the cheque for payment. Thus the evidence is evenly balanced and there is no preponderance of probability. On the one hand, there is the evidence that the plaintiff wanted insurance for the goods, is financially able to meet the cheque and that Tee had not instructed Mr. Lim to request either Ng or Ivy not to present the cheque for payment while on the other hand we have assertion of Ng and Ivy that Mr. Lim had called them to tell them not to present the cheque for payment and that there is no reason why they would not present the cheque for payment if they have not been told by Mr. Lim not to. Mr. Lim's evidence would tilt the balance but he was not called by either side. What then, is the legal result of such a situation? It is the defendant's assertion that Mr. Lim called Ng and Ivy not to present the cheque for payment. Therefore, the defendant carries the burden of proving that assertion. Since the evidence, as I have said earlier is evenly balanced, the defendant had failed to discharge that burden of proof. See *Government of the State of Penang & Anor. v B.H. Oon & Ors.* [1971] 2 MLJ 235 PC, at p. 238.

Another reason advanced by Mr. Skinner, learned Counsel for the defendant, for the Court to conclude that there was in fact a request made not to present the cheque for payment was put forth in the following manner:

> PW1's conduct after the fire more consistent with fact he knew cheque not bank in and that the policy was automatically cancelled. If PW1 believed it was fault or omission of defendant for not banking in cheques on 9 April 1992 it is reasonable to expect that he would immediately remonstrate or created a fuss at defendant's office when he went there the morning after the fire. Instead, he said "he informed the defendant of the fire" and when questioned what the defendant did, PW1 said I do not know and he said defendant did not ask for further information (page 4 lines 7-8 NP). One would expect at this stage PW1 to push for information his policy was effective, asking for receipt in respect of the premium, demanding his claim would be met and that the defendant would take action on his loss. As opposed to story of the plaintiff, I submit defendant's version is more consistent with a request having been made to withhold banking in. There would have been no reason for PW9 not to bank in on 9 April 1992 unless there was such a request. PW9 had responsibility for cheque kept in receipt book for easy reference and normal procedure to issue receipt when cheque bank in. On this occasion she did not bank in on request of Mr. Lim which request was repeated to PW7.

The relevant part of the evidence of Tee referred to in the passage, *supra* is as follows:

> Q: Subsequently there was fire on 14 April 1992.
> A: Yes.
>
> Q: What did you do when you discovered fire?
> A: I informed defendant of fire.
>
> Q: What did they do?
> A: I do not know.
>
> Q: Did they ask for any further information from you?
> A: No.

Q: Did any of your staff or yourself call them?
A: No.

It can he gathered from the evidence that all that Tee did on the morning of 15 April 1992, was to report the fire that had happened the night before and he said he did not know what the defendant did after he had reported the claim. That was the evidence given by Tee when under examination-in-chief. Further light was thrown on what happened that morning when Tee gave the following evidence when cross-examined, *viz.*:

Q: Fire on 14 April 1992 evening, did you not look for Ng Tiam Choi that evening.
A: I did not.

Q: Did you not go to office of defendant on 15 April 1992?
A: I did.

Q: You went with a friend.
A: Yes.

Q: You went to see Ng Tiam Choi.
A: Yes.

Q: For the purpose of asking him to ensure the policy was effective after informing him of the fire.
A: We went there to make a report that our factory was burnt.

Q: When you made report, Ng told you policy automatically terminated because of non-payment.
A: He did not tell me.

Q: What did Ng say, policy will be paid?
A: No. He did not say.

Q: What did he say in response to your report of fire?
A: He said he will as soon as possible process the matter.

Put: On morning of 15/4 Ng informed you policy cancelled because of non-payment.
A: I disagree.

Therefore, it is the evidence of Tee, that Ng had said he will process the claim as soon as possible though he did not say the claim will be met. Thus, according to the evidence of Tee, there was no reason, since the claim had not been rejected, to demonstrate or to make the moves that one expects of a person who felt uneasy about the validity of the policy or take the stance one would expect of a person who had just been told that his claim had been rejected. The claim had not that morning been rejected. Therefore, I see no ground for holding that the conduct of Tee when he went to the office of the defendant can in any way support the contention that it was consistent with the fact that Mr. Lim had requested the cheque not to be presented for payment. I am of the view that the plaintiff had not through anyone made any request to withhold the presentation of the cheque for payment. Therefore the policy was in force on 14 April 1992. This brings me to the next issue.

B. Was defendant entitled to repudiate liability?

The defendant says they are entitled to repudiate liability because the plaintiff is in breach of warranty 9(A) of the policy which says:

Licence Warranty 9(A)

> Warranted that during the currency of this policy the insured shall hold such licence or licences as is or are required by the Local Municipal or other Authorities and shall fully comply with the conditions and requirements and thereof at all times.

and which warranty, submitted Mr. Skinner is a condition the breach of which entitled the said repudiation. Learned Counsel then referred to *New Zealand Insurance Co. Ltd. v. Ong Choon Lin* [1992] 1 MLJ 185 SC. pp. 196 -197 for the proposition that a warranty in an insurance policy is a condition. Mr. Tan replied to say that the warranty is not a condition precedent and the defendant is not entitled to repudiate liability and referred to *Stoneham v. Ocean Railway and General Accident Insurance Co.* [1887] 19 QBD 237. The facts of *Stoneham v. Ocean Railway and General Accident Insurance Co.* are these. The policy provides notice of fatal accident to be given within seven days to the Insurer's London Office and a drowning occurred in Jersey and it was impossible to give notice within the said time. The policy was expressed to be "subject to the conditions indorsed hereon which shall be considered as incorporated herein. The Court there held that the provision of notice was not a condition precedent and Mathew J pp. 239-240 said:

> In some cases it has been expressly agreed that compliance with the terms imposed should be a condition precedent, and in those cases compliance with the terms has been held to be a condition precedent, but where the question is left at large, it is for the Court to say, looking at all the terms of the policy, what the true meaning of the contract is.... The notice is not stated to be a condition of liability, nor is there any stipulation that if no notice is given the policy shall be void. The clause is probably inserted in order to save the company from the extra expense which they would incur if they had to investigate the circumstances of accidents at long intervals after their occurrence. On consideration of all the terms of the document, I am satisfied that, according to the correct interpretation, the giving of notice of the accident within seven days is not a condition precedent to the enforcement of the policy.

The provisions of the policy of our case are different. The commencing part of the policy, *supra*, expressly states that whatever condition is endorsed in the policy shall he deemed to be a condition precedent. The very provision, that is warranty 9(A). was considered in *New Zealand Insurance Co. Ltd. v. Ong Choon Lin* and the Supreme Court there came to the conclusion that it is a condition precedent and it must also be so in our case. The alleged breaches are set out in the relevant sub-paragraphs of para. 4 of the amended defence. *viz*:

> The plaintiff was operating the business of the tyre retreading factory and was manufacturing retreaded tyres:
>
> ...
>
> iv. Without a Certificate or Permit or approval from the Chief Inspector of Factories and Machinery for the occupation or use of the factory and for the instalment and use of the plant and Machinery operation and /or
>
> v. Without the approval certificate from the Sabah Electricity board and or the Director General of Electricity Supply approving the electrical system or installation of machineries for purposes of manufacturing of retreaded tyres: and/or
>
> vi. Without the necessary building plan approval for the premises to be used as tyre retreading factory from the Municipal Council.
>
> Further, throughout the currency of the said policy, the plaintiff was operating the business of tyre retreading factory and was manufacturing retreaded tyre in breach of the special term

> of the land title CL015452874 which provides that " the said land is demised herein expressly and only for the purpose of erecting thereon for the use as such one light Industrial Warehouse.

Again, this issue hinges in part on the construction to be given to the words "Licence or Licences as is or are required by the Local Municipal or other Authorities." Mr. Skinner argued that the words should be given a purposive and not an unduly restrictive interpretation and that the word "licence" includes "certificate" "permit" and "approval" spelt out in the Factories and Machinery Act 1967, and the regulations made thereunder, the Electricity Act 1990, the Lembaga Letrik Sabah Act 1983 and the relevant building bylaws of the Kota Kinabalu Municipal Council, and includes the "special terms of the land title" Support for this view, according to Mr. Skinner, can be found in the *New Oxford Illustrated Dictionary* which provides the following definition at p. 266:

> **certificate** ... Document formally attesting a fact. esp. the bearer's status acquirements, fulfilment of conditions, right to company shares, etc **certificate** ... Furnish with licence by certificate

and at p. 973:

> **licence** ... leave, permission, formal, usu. printed or written, authority to marry, publish books, drive vehicle, carry on some trade (esp. that in alcoholic liquor). etc: ...

On the other hand, Mr. Tan learned Counsel for the plaintiff, argued that the word "licence" must be narrowly defined to mean only the trading licence which the Kota Kinabalu Municipal Council had issued to the plaintiff under the Trade Licensing Ordinance 1948 to carry on the trade of "Import & Export of Tyres & Tubes - Retreaded Tyres & Service".

How, then should this issue be approached? The argument of Mr. Skinner presupposes that the words "Local Municipal or other Authorities " include the Kota Kinabalu Municipal Council ("the Council"). The Fire Department, the Sabah Electrical Board, the Electricity and Gas Supply Department. That the words include the Council is beyond doubt but can they be construed to include the said statutory board and government departments. This brings to mind the canon of construction known as the *ejusdem generis* rule which was put in this way by Lewison on *Interpretation of Contracts*, p. 142:

> If it is found that things described by particular words have some common characteristics which constitute them a *genus*, the general word which follows them ought to be limited to things of that *genus*.

In the present case the words" Local Municipal" were admitted by the parties to include the Council. In Sabah various Municipal Councils, Town Boards and District Councils have been established under s. 3 of the Local Government Ordinance, 1961, each having its own area of jurisdiction and they are collectively described, under Part II of the said Ordinance, as "local government authorities". Clearly, the words "Local Municipal" described something which could be placed under the common category of local government authorities and they, as such constitute a genus which therefore attracts the *ejusdem generis* rule. Therefore, the general words - "other authorities" - must be construed *ejusdem generis* and be limited to local government authorities established under the said ordinance. Thus I am unable to agree with Mr. Skinner the words could be construed to include statutory boards and government departments established under legislation other than the Ordinance. The only local government authority that falls to be considered is the Council. This brings me to the rival

contentions it will be recalled of Mr. Tan that the words - "licence or licences" - are limited to the trading licence and of Mr. Skinner that they include the "approval" under the Building By-Laws 1951. The relevant provisions adverted to by Mr. Skinner are:

> Bylaw 2(1) - No person shall erect or commence to erect any building upon any land within the Sanitary Board area except subject to the written permission and control of the Board and in accordance with the provisions of these Bylaws: and no person shall re-erect with such directions and subject to such approval and control.
>
> Bylaw 3 - A person shall he deemed to erect a building who ... (c) converts or adapts any building to a purpose other than for which it was originally approved.
>
> Bylaw 38D - where any building has been erected no person shall except with the written permission of the Council and upon such terms as may be imposed alter or use or (being the owner thereof) suffer such building to be used otherwise in respect thereof: nor to be occupied in such manners as to provide more dwelling than were specified or indicated in such application and plans.
>
> Bylaw 46A - At least four copies of electrical plans including the schematic drawings shall be submitted to the Board for forwarding to the Sabah Electrical Board ... for approval ...

and learned Counsel argued that the plaintiff was not in possession of any of the approval and since the dictionary meaning of the word "licence" includes permission or approval, the plaintiff was in breach of warranty 9A which required the plaintiff to be in possession of such approval. The evidence adduced by the defendant in this regard was that of Chan Kok Ming, a civil engineer employed in the building section of the Council and he produced an occupation permit issued by the Council on 19 September 1983, the relevant part of which reads:

Occupation Certificate New Warehouse (Ph. 1)

> This is to inform you that the building recently erected ... has been inspected and is found to have been completed in accordance with the approved plan. You are hereby authorised to occupy the said premises
>
> ...

In answer to a question whether the use of the premises can be changed from that of a warehouse to that of a factory, he said:

> Can with permission of MPKK. He has to submit plans. Renovation plans have to be submitted and he must indicate the use. Plans to show. Electricity supply. The plan will be circulated to various departments, fire department, S.E.B. Health office department. The building plan sub-committee will then meet to consider the application. After approval, the building will be inspected by the various officers and occupation permit will be issued if everything is all right. There is no record of plaintiff having submitted plan to MPKK to change the purpose of the use of the premises. There was also none from Yisu. There was an application to partition by Onaki Food. None from Summit Kota.

It was upon the evidence that I have just recapped that Mr. Skinner submitted that the plaintiff was using the premises as a manufacturing factory and not as a warehouse and this was without the approval of the Council and that this does not comply with the occupation certificate. The title to the land upon which the premises was erected specifically allows the erection and use thereon of "one light industrial warehouse". Given the provision of Bylaw 38D, it is important to establish what the application and what the approved plan state as to

what use the premises will be put to before one can consider whether there had been a change in the user. Neither the application nor the approved plan was produced. Since it is the defendant's case that the use of the premises was not in accordance with that stated in the application or the approved plan, the defendant carries the burden of establishing that and they have failed to do so. That means the Court cannot in the absence of the application or the approved plan conclude that there was any change in the use of the premises since its approval by the Council Chan Kok Ming was never asked and he never said to what use the premises had been applied for or approved. The fact that he could not find any application for the change of the use of the premises does not mean that the use to which the plaintiff had put the premises to was different from that approved by the Council. It could very well be that there was no such application because there was no change in the use or else how could one explain that no action was taken against the plaintiff if in fact the use of the premises was other than the use approved by the Council. That evidence of an application is therefore neither here nor there. The point to be borne in mind is that the occupation certificate merely states the premises was constructed in accordance with the approved plan and authorises its occupation. It does not state to what use the premises can be put to. The law that governs the type of building that may be put up in a particular area is the approved scheme of the Town and Country Planning Ordinance. To carry out development of any land, a development or subdivision plan must first be submitted to the local government authority concerned and the proposed development must be one that is authorised by the approved scheme. It is only after the approval of the development plan that the building plan would then be submitted for approval. The whole process involves applying after the development plan had been approved to the Lands & Survey Department Sabah to subdivide a title into as many titles as they are as many building lots which the development provides for. The subdivided title will take some time to be issued but development work will commence. In the present case the premises was already completed on 19 September 1983, but the subdivided title was only made on 1 January 1985, and registered on 10 March 1986. When this subdivided title speaks of the erection and use of a "light industrial warehouse" it must have taken into account what the Council had approved and this must have been the erection of a "light industrial warehouse" and its use thereof as such. Therefore, in considering what use the premises may be put to, it is not the word "warehouse", stated in the occupation certificates that the Court must take into account but rather, the words "light industrial warehouse". The approved scheme in respect of the land in question was revoked by a Sabah Government Gazette No. 20. dated 16 December 1977. However, the new scheme had not been approved yet. But interim development is allowed under s. 15 of the Town and Country Planning Ordinance. It must have been under this provision that the approval of the development plan was made. Since the word "Industrial" comes from the word "Industry" which latter word according to the *Concise Oxford Dictionary*, means "a branch of trade or manufacture", it means the use of the premises for manufacturing tyre was approved. The defendant fails in this ground for resisting the claim.

That leaves the last of the issues which is whether there was non-disclosure of material facts. The material facts for which non-disclosure was alleged are (1) the use of petrol or other volatile liquid (for which no answer was stated to question 9 of the proposal form). (2) the insurance with QBE Insurance (Malaysia) Bhd. (for which a negative answer was stated to question 12 of the proposal form) and (3) the charge of the property to Sabah Finance Berhad (for which a negative answer was stated to question 16). Mr. Skinner conceded that s. 44A of the Insurance Act 1963, deeming Ng the agent of and deeming his knowledge to

be that of the defendant, would destroy the defence but only if Tee's evidence in this aspect of the case is to be believed. It is therefore, necessary to examine the evidence in more detail. First, the evidence of Tee.

According to Tee, he does not read or write English and he trusted Ng to fill up the proposal form for him which was done after a questions and answer session. There is no dispute there. Ng, accompanied by Tee, inspected the whole factory and the property before the defendant issued the policy. This was denied by Ng. Tee was asked by Ng whether the plaintiff had a trading licence and he produced one. He told him all that Ng wanted to know. It was only after that he signed the proposal form. As for the renewal notice, Tee said Ng also inspected the premises before Tee signed the renewal notice. It was also before he signed the renewal notice and in pursuant to questions by Ng that Tee told Ng that the trading licence had been renewed, that the quantity of goods and machinery had increased, that they were insured with QBE and that they were purchased with a loan from Sabah Finance. Ng only admitted to being told about the additional goods and machinery. As a result Ng asked Tee to cancel the QBE policy and to increase the cover with the defendant. Tee said he cancelled the QBE policy by not paying the premium. It was after this that a cheque for the premium was issued and collected. Mr. Skinner had submitted that Tee is not to be believed for the following reasons. Learned Counsel submitted that since the QBE policy carried an endorsement of the interest of Sabah Finance, the defendant's policy should carry a similar endorsement if in fact Tee had told Ng about the charge to Sabah Finance and if in fact Ng had advised the cancellation of the QBE policy and its replacement by the policy. I am unable to agree that the mere absence of an endorsement in the policy of the interest of Sabah Finance can justify the conclusion that Tee is not a truthful witness. Tee had, when cross-examined, said that it was not necessary for him to arrange for the interest of Sabah finance to be covered. The non-payment of the premium for the QBE's insurance supports Tee's assertion that the QBE policy was cancelled as a result of the advice of Ng which means that Tee had in fact told Ng about the QBE policy and I so find. If the events were not as told by Tee, I would expect at least the deposit of a cheque with QBE for the premium of the QBE policy if the plaintiff had wanted to continue with the QBE policy. Why should the plaintiff take the trouble of getting QBE to issue a policy and yet not bother to issue a cheque made payable by the 60th day, to QBE unless there was a supervening event rendering the QBE policy unnecessary. There was in such an event and which was the disclosure to Ng of the QBE policy and the consequent advice of Ng to cancel the QBE policy. Another reason submitted by Mr. Skinner for not believing Tee that the increase in the cover was not for the extra amount for which the QBE policy was taken out which was RM 417,500. It will be recalled that the increase was from RM500,000 to RM800,000. Mr. Skinner submitted that if what Tee said was the truth, the amount insured by the policy should be RM917,000.Tee had said that by the time he took out the policy, the value of goods was RM800,000. Tee had also explained that the machinery had since their purchase depreciated in value from the time of the first policy. That, I am satisfied, explains why the policy was not for the amount of RM917,500 but for RM800,000. Therefore, since Tee had disclosed to Ng what was required by the said questions, there was no non-disclosure.

This brings me to the final issue of this case. The defendant contends that the failure to answer question 9 amounts to a false representation in a material particular or a failure to disclose material facts because the plaintiff had failed to disclose solution containing petrol or other volatile liquid that were in the premises and their use in the premises. As a result, contends the defendant the renewal of the policy was void. By that argument, Mr. Skinner equated the failure to answer as a negative answer, a contention originating from Ivy in the

course of her testimony. Ivy testified that she, before the issue of the policy visited the premises and saw tyres being cured, which is the retreading of the tyre. The retreading of the tyre involved the use of gum, a volatile substance and Ivy was therefore aware of the use of gum. This knowledge, by virtue of s. 44A of the Insurance Act, 1963 became the knowledge of the defendant. Therefore it cannot be said that the plaintiff had failed to disclose the same as to affect the defendant's decision whether to insure the risk or not. But Mr. Skinner argued that the evidence of what Ivy saw in the premises cannot be admitted as this would vary the answer to question 9 and learned Counsel referred to *China Insurance Co. Ltd. v. Ngah Ah Kau* [1972] 1 MLJ 52. That case can be distinguished. In that case, answers were given whereas in our case there was no answer. There is no question of contradicting that which does not exist. I do not see how that case can help the defendant. In our case, the defendant before the issue of the policy knew the plaintiff used volatile substance and evidence was introduced by the defence of Ivy's visit to the premises and of her seeing the curing of tyres. It must be remembered that Ivy had said a new proposal form was required for the policy as the insured amount had increased. She also said there was such a proposal form though in re-examination she said she was not sure. If there was no new proposal form, it means Ivy was not relying on any proposal form and was content with her investigation which she carried out when she inspected the premises before she issued the policy. If there was such a new proposal form then all the evidence in relation to the old proposal form and their answers or lack of answers cannot be relied on as that form was replaced by another one. Neither case helps the defendant. What is clear to me from the evidence is that the defendant despite the absence of an answer to question 9 still proceeded to issue the policy because Ivy was aware of the volatile substance and was prepared to accept the risk. In any event, though the answer to Question 9 of the proposal form was not written down, the answer can be considered as having been provided by the plaintiff showing Ivy the premises where the volatile substance was used. This defence also fails.

Conclusion

Since damages were admitted at RM543,257 by the defendant and conceded by the plaintiff, I give judgment for the plaintiff for the sum of RM543,257 together with costs and statutory interest.